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A Review of the Implementation of the Pennsylvania Equal Rights Amendment

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Comments

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> [I]n a case by case implementation of the amendment, we are quite aware that we are treading with sneakers in virgin territory. . . . We fear that if we interpret the Equal Rights Amendment as simply as would a country preacher the Bible, we will space out social theories beyond the point of workability.[1]

I. INTRODUCTION

In 1971 the people of this state voted to amend the Pennsylvania Constitution by adding the following provision: "Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual."[2] The subject of an equal rights amendment such as this typically arouses concern that legal equality of the sexes will lead to social and familial chaos or abrogation of prerogatives enjoyed by one or the other sex. Needless to say, equality of rights of males and females does not mean equality of the sexes. But the distinction is a fine one that may not aid a court which must grapple with the interpretation of a new constitutional amendment of potentially revolutionary effect. Courts engaged in a case by case implementation of the provision perhaps inevitably balk at reformulating social theories, particularly in the absence of a clear expression of legislative intent. The actual impact of an equal rights amendment then, cannot be predicted easily.

Five years after passage of the Pennsylvania equal rights amendment (ERA) it is appropriate to survey its effect on the laws and institutions of the state. While the potential for change is enormous this comment attempts only to discuss the cases, legislation and administrative responses to the amendment, and to raise some

1. Frank v. Frank, 14 Lebanon 215, 216, 62 Pa. D. & C.2d 102, 103 (C.P. 1973).
2. PA. CONST. art. I, § 28.

questions meriting judicial or legislative attention.[3] This survey first briefly discusses the legislative history of the Pennsylvania ERA. Then follows a discussion of the impact of the amendment in four major areas: criminal justice, domestic relations, education, and employment. Finally, an attempt is made to look beyond substantive change and analyze the courts' reaction to the command of a new constitutional amendment. Here the study will focus on the standard of review the Pennsylvania courts have applied in this area of constitutional adjudication. This aspect of the ERA is significant because dissatisfaction with prior constitutional standards provided the impetus for support for the new constitutional provision.[4] The courts' reactions show they have not taken the fundamentalist approach, as would "country preachers," but are for the most part treading lightly through ERA territory.

II. Legislative History

In Pennsylvania the legislative history of statutory and constitutional enactments is almost nonexistent. As a result there is no official history of the proposal and passage of the Pennsylvania ERA. However, documents from the files of a member of the Greater Pittsburgh Chapter of the National Organization for Women, Inc. (NOW) reveal that the initial impetus for an amendment came at a meeting of that group in the spring of 1969. Pittsburgh NOW's Legislation Committee was then engaged in proposing revisions of state laws to eliminate sex discrimination. Included in NOW's proposals was the amendment to the Pennsylvania constitution.[5] In March, 1969 the NOW members had gained a legislative sponsor for

3. No attempt is made to catalog all statutes or common law rules which must fall to the ERA. The Governor's Commission on the Status of Women is conducting a comprehensive review of all state statutes that are gender-based. *See* G. Mikus & M. Warlow, Equal Rights Amendment Statutory Review Project, Phase I: Retrieval and Analysis of Pennsylvania Law, Pennsylvania Commission for Women, 1975 [hereinafter cited as Statutory Review Project].

4. *Cf., e.g.*, Dorsen & Ross, *The Necessity of a Constitutional Amendment*, 6 Harv. Civ. Rights-Civ. Lib. L. Rev. 216 (1971), discussing the federal equal rights amendment.

5. Greater Pittsburgh Area Chapter of National Organization for Women, Inc., Minutes, February 20 and March 19, 1969 [hereinafter cited as NOW Minutes]; *Hearings on the Equal Rights Amendment Before the Pennsylvania Senate Committee on Constitutional Changes and Federal Relations*, June 1, 1972 (testimony of Jean Witter) [hereinafter cited as Witter Testimony]. The writer wishes to thank Jean Witter of Pittsburgh for making these documents available.

the proposal and were at work recruiting additional support and advocacy.[6] The amendment was introduced in the House on October 6, 1969, and was passed unanimously as a joint resolution by two successive General Assemblies[7] as required by the state constitution.[8] On May 18, 1971, the voters of the Commonwealth ratified the Pennsylvania ERA and it became part of the state constitution.[9]

No reports or hearings were published by the committees which considered the proposed amendment. Feminist groups however presented two reports to the Senate Committee on Constitutional Changes and Federal Relations.[10] These reports constituted the only formal presentation made to the Committee at its deliberations during the first legislative session which approved the Pennsylvania ERA. From these documents it is possible to gain some insight into the intent behind passage of the amendment.

It is clear that the organized proponents of the amendment felt it was needed because the United States Supreme Court had not responded more affirmatively to sex discrimination charges under the federal constitution.[11] The state ERA was seen as an "effective and expeditious"[12] way to prevent enactment of discriminatory state legislation in the future and to erase numerous instances of sex-based classification in existing state laws.[13] A constitutional

6. State Rep. Gerald Kaufman of Pittsburgh was the first to agree to sponsor the amendment, and remained the primary sponsor. NOW Minutes, *supra* note 5.

7. J. Res. of 1970, No. 5, [1970] Laws of Pa. 971; J. Res. of 1971, No. 2, [1971] Laws of Pa. 767.

8. PA. CONST. art. XI, § 1.

9. PA. CONST. art. I, § 28. After passage, the ERA was for some time mistakenly identified as art. I, § 27, and some of the early cases cite it as such.

10. B.E. CRAWFORD, N.O. BOWDLER, V.W. HARRINGTON & J. WITTER, PRESENTATION TO THE COMMITTEE ON CONSTITUTIONAL CHANGES AND FEDERAL RELATIONS—H.B. 1678—A PROPOSED AMENDMENT TO THE PENNSYLVANIA CONSTITUTION, GREATER PITTSBURGH AREA CHAPTER NATIONAL ORGANIZATION FOR WOMEN, INC. (1970) [hereinafter cited as NOW REPORT]; C. EAST, THE EQUAL RIGHTS AMENDMENT: WHAT IT IS, WHY IT IS NEEDED, AND THE LEGAL, ECONOMIC, AND SOCIAL IMPLICATIONS, INTERDEPARTMENTAL COMMITTEE ON THE STATUS OF WOMEN (1970) [hereinafter cited as EAST REPORT].

11. Equality of rights under the law for all persons, male or female, is so basic that it should be reflected in the fundamental law of the land. Despite this, in 5th and 14th Amendment cases alleging discrimination on the basis of sex, the *U.S. Supreme Court has never held that a law classifying persons on the basis of sex is unreasonable and, therefore, unconstitutional.*

NOW REPORT, *supra* note 10, at 1 (citations omitted) (emphasis in original).

12. *Id.* at 3.

13. Examples of inequities needing to be cured included discrimination in regulation of sexual conduct and in sanctions for sex crimes, jury service laws resulting in discrimination against men, and denial to wives of the right to sue for loss of consortium. *Id.* at 2-3.

amendment, its supporters believed, would be largely self-executing—impliedly repealing discriminatory laws—and would take a stronger stand against sex discrimination than courts appeared willing to take of their own initiative.[14] Ultimately, proponents of the ERA viewed it as a step toward the complete legal and social equality of men and women.[15] The available documents however fail to address the more difficult question of what standard of review[16] the courts should follow in implementing the new state amendment. Legislative history of the proposed federal equal rights amendment was referred to as a source of information for defining the actual legal meaning of such an amendment.[17]

Most importantly, the Pennsylvania ERA was part of a larger strategy to gain passage of a federal amendment.[18] Although the Pennsylvania amendment cannot be termed a mere afterthought, its supporters apparently realized that their goals would remain unattained until the federal constitution was amended. Paradoxically, the success at the state level eventually was offered in opposition to ratification of the federal amendment. Members of the legislature and others expressed the opinion that Pennsylvania women, who were guaranteed equal rights under the state constitution, had no stake in a further federal guarantee.[19] The ERA supporters re-

14. EAST REPORT, *supra* note 10, at 2.

15. NOW REPORT, *supra* note 10, at 3, stated:

> When women have achieved true and complete legal and social equality with men, the problem of men and women's knowing who or what they are will probably disappear. . . .
>
> To that end . . . the proposed Equal Rights for Men and Women Amendment to the Pennsylvania Constitution, has been introduced in the General Assembly.

Cf. Henderson v. Henderson, 224 Pa. Super. 182, 186-88, 303 A.2d 843, 846-47 (1973) (Spaulding, J., dissenting), *rev'd*, 458 Pa. 97, 327 A.2d 60 (1974) (force of ERA not limited to political, educational and economic equality but extended to area of domestic relations).

16. *See* text accompanying notes 221-26 *infra*.

17. EAST REPORT, *supra* note 10, at 2.

18. Philadelphia Evening Bulletin, May 5, 1971, at 46, col. 1. The EAST REPORT, *supra* note 10, was actually addressed to the effect of an ERA on federal and state law.

19. *See* Witter Testimony, *supra* note 5 stating: "Recently, a few women have suggested that women in Pa. [*sic*] have enough rights under the Pa. Constitution, that perhaps we don't need the Federal Amendment." *See also* 1 PA. LEGIS. J., 156th Sess. 1689 (1972) (Senate) (remarks of Senator Hawbaker):

> Pennsylvania's Constitution has already been amended to guarantee equal rights. I voted for the bill that brought about this amendment. I would hasten to add, however, that I voted for a bill to submit to the people of this Commonwealth the right to decide for themselves whether their Constitution should be amended in this regard. What we are doing here today is a great deal different. We are saying to the people of the

sponded by reaffirming their original goal,[20] implying that recognition of sexual equality solely at the state level was ultimately unsatisfactory, and that only a guarantee of national scope would perfect the rights at stake. Eventually, on September 26, 1972, Pennsylvania, the first state to add an equal rights amendment to its state constitution, became the twenty-first state to ratify the federal amendment.

III. Criminal Justice

A. *Sentencing*

State laws commonly extend disparate sentencing treatment to men and women convicted of crimes. In Pennsylvania before 1968, men were sentenced under a general sentencing statute which permitted judges to set maximum and minimum sentences within the statutorily prescribed maximum period.[21] Women over sixteen years of age were sentenced separately under the Muncy Act[22] to an indeterminate period which was limited by the maximum term specified by law for the crime involved. In effect, the different treatment prescribed by the two statutes meant that women could not receive a maximum sentence shorter than the statutory maximum, as could men, and could not receive a minimum-maximum sentence.[23] In 1968, prior to ratification of the Pennsylvania ERA, in *Commonwealth v. Daniel*[24] the Pennsylvania Supreme Court found the Muncy Act arbitrary, discriminatory, and lacking reasonable grounds of differences, and therefore violative of the fourteenth amendment to the Federal Constitution.[25] The court stated that

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remaining states, the states that may not choose to pass this kind of legislation, "You must do it because we say so."

Id.

20. Witter Testimony, *supra* note 5 stated:

> Since the Pa. [*sic*] ERA was intended as a step toward the Federal Amendment, the thousands of women who eventually worked for the passage and favorable referendum, will never stop working and pressuring for ratification of the Federal ERA and they achieve their original goal, namely, the Equal Rights Amendment to the U.S. Constitution.

21. Pa. Stat. Ann. tit. 19, § 1057 (1964).

22. Act of July 25, 1913, No. 816, § 15, [1913] Laws of Pa. 1315. The act took its name from the State Correctional Institution at Muncy (formerly the State Industrial Home for Women) where all adult women prisoners were incarcerated.

23. *See, e.g.*, Commonwealth v. Daniel, 430 Pa. 642, 647, 243 A.2d 400, 402 (1968).

24. 430 Pa. 642, 243 A.2d 400 (1968).

25. *Id.* at 650, 243 A.2d at 404.

biological, natural and practical differences between men and women could justify some types of differing treatment. As such, classification by sex was not per se violative of the equal protection clause. However, the court found no reasonable difference between male and female convicts to justify the differing sentencing treatment.[26]

The legislature promptly revised the Muncy Act. The new statute prohibited imposition of minimum sentences for women offenders but allowed judges to use their discretion in setting a maximum sentence within the statutorily prescribed maximum period.[27] This sentencing scheme came under attack in 1974 in *Commonwealth v. Butler*.[28] Ronald Butler, convicted of second degree murder, charged on appeal that, insofar as the Muncy Act required trial courts not to impose minimum sentences on women offenders, the joint operation of the general sentencing statute and the Muncy Act was unconstitutional.[29] The court agreed and held the new act unconstitutional under the Pennsylvania equal rights amendment and the fourteenth amendment to the Federal Constitution.[30] At the heart of the issue in *Butler* was the fact that minimum sentences affect parole eligibility. Prisoners under a minimum sentence are eligible for parole upon the expiration of that minimum period.[31] Female offenders, not subject to a minimum sentence, were eligible for parole immediately.[32] Denying male offenders the opportunity for immediate parole was discriminatory sex-based treatment which the ERA was intended to end.[33]

The court's constitutional analysis in *Butler* had three facets: (1) the Pennsylvania Constitution prohibited use of sex as an exclusive classifying tool; (2) parole was a "fundamental" state policy; and

26. *Id.* at 649-50, 243 A.2d at 403-04.

27. Act of July 16, 1968, No. 171, § 1, [1968] Laws of Pa. 349. *See also* Young, *When Should the Judge State a Minimum Sentence?*, 44 PA. B. ASS'N Q. 551 (1973) (review of then-existing sentencing statutes).

28. 458 Pa. 289, 328 A.2d 851 (1974).

29. *Id.* at 290, 328 A.2d at 852.

30. *Id.* at 302-03, 328 A.2d at 859. Butler's judgment of sentence was affirmed, however, because the general statute under which he was sentenced was completely neutral on its face. *Id.* at 303, 328 A.2d at 859.

31. PA. STAT. ANN. tit. 61, § 331.21 (1964).

32. 458 Pa. at 295, 328 A.2d at 855. However it appears that it was common practice to wait one year before granting women parole. Commonwealth v. Hampton, 19 Chest. Co. Rep. 291, 292 (Pa. C.P.), *aff'd mem.*, 219 Pa. Super. 760, 281 A.2d 341 (1971).

33. 458 Pa. at 296-98, 328 A.2d at 855-57.

(3) there was no rational basis for predicating parole eligibility on sex.[34] Thus notwithstanding their reliance on the ERA the *Butler* court apparently felt it necessary to support its conclusion with the supplemental holding that the sentencing scheme denied equal protection under the Federal Constitution.[35] *Butler* found the court unready to rely solely on the Pennsylvania ERA to prohibit sex-based classification.

After *Butler*, the Muncy Act was again amended to delete the language prohibiting minimum sentences for women.[36] Thus, at least with regard to the setting of minimum and maximum sentences and eligibility for parole, women offenders are covered by the general state sentencing statute.[37] Although under the former statutory scheme, no parole standards for women existed,[38] presumably women and men are now eligible for parole on equal terms.[39]

B. *Prisons and Reformatories*

1. *Adult Prisoners*

The State Correctional Institution at Muncy, Pennsylvania, was from its establishment the only state facility authorized to receive female prisoners.[40] This could be contrasted to the treatment of male prisoners, who could be assigned to one of several state institutions, presumably affording males a greater chance of being closer to their families, as well as being exposed to a larger variety of rehabilitation programs.[41] In Pennsylvania, isolation of women prisoners who must be sentenced to Muncy may eventually be alleviated by a recently enacted statute which establishes regional

34. *Id.*

35. *Id.* at 296, 328 A.2d at 855, *citing* Conway v. Dana, 456 Pa. 536, 318 A.2d 324 (1974). *See* Brown, Emerson, Falk, & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 965-66 (1971) [hereinafter cited as Brown].

36. Act of Dec. 30, 1974, No. 345, § 2(a), [1974] Laws of Pa. 932, *repealing in part* PA. STAT. ANN. tit. 61, § 566 (Supp. 1976).

37. PA. STAT. ANN. tit. 19, § 1057 (1964).

38. STATUTORY REVIEW PROJECT, *supra* note 3, at 3.

39. Such facial equality however will not obviate the "chivalry" factor which may result in more lenient treatment for women than for men. A. BINGAMAN, A COMMENTARY ON THE EFFECT OF THE EQUAL RIGHTS AMENDMENT ON STATE LAWS AND INSTITUTIONS 57 (1975) [hereinafter cited as BINGAMAN].

40. PA. STAT. ANN. tit. 61, §§ 561-79 (Supp. 1976).

41. STATUTORY REVIEW PROJECT, *supra* note 3, at 3. *See also* BINGAMAN, *supra* note 39, at 70-73.

treatment centers for women throughout the state.[42] The statute allows commitment of adult women offenders, among others, to the centers.[43] Because the act establishes geographically dispersed facilities and provides for rehabilitation programs, it should[44] cure some of the major nonfacial inequities of a sex-classified prison system. It does nothing however to resolve the problem of physical segregation. Arguably the Pennsylvania ERA would invalidate the statutory requirement of separate systems for male and female prisoners,[45] although the constitutionality of the dual system has not been litigated. The issues raised are complex and involve the collision of the ERA with other constitutional guarantees, such as the right to privacy[46] and the prohibition against cruel and unusual punishment.[47]

2. *Juveniles.*

The assignment of male and female juveniles to facilities for delinquents did surface as a sex discrimination issue in one case. *In re Haas*[48] questioned a lower court's authority to assign a delinquent female to Muncy and to require the superintendent to accept her and provide a separate facility which would meet the requirements of the Juvenile Act.[49] Because the superior court disposed of the case on other grounds[50] it did not reach the constitutional questions raised by the trial court.[51] The judge below[52] had suggested that because male juvenile delinquents could be committed to the State Correctional Institution at Camp Hill and kept separately from adult offenders incarcerated there, female juveniles could be com-

42. PA. STAT. ANN. tit. 61, §§ 460.11-.17 (Supp. 1976).

43. PA. STAT. ANN. tit. 61, § 460.14(1) (Supp. 1976).

44. The major difficulty appears to be obtaining funds to establish centers. The legislature, in 4 years, has yet to appropriate money for this purpose.

45. *Cf.* BINGAMAN, *supra* note 39, at 66-67.

46. Griswold v. Connecticut, 381 U.S. 479 (1965).

47. U.S. CONST. amend. VIII. Women imprisoned with a large number of men might claim an eighth amendment right to protection from physical danger. BINGAMAN, *supra* note 39, at 69. *See also* Note, *The Sexual Segregation of American Prisons*, 82 YALE L.J. 1229 (1973).

48. 234 Pa. Super. 422, 339 A.2d 98 (1975).

49. PA. STAT. ANN. tit. 11, §§ 50-101 to -337 (Supp. 1976). *See especially id.* § 50-322.

50. It found that the lower court had not considered all possible alternative facilities before assigning Haas to Muncy. *See* PA. STAT. ANN. tit. 11, § 50-322 (Supp. 1976). 234 Pa. Super. at 431, 339 A.2d at 102-03.

51. 234 Pa. Super. at 428-29 n.2 & 433 n.6, 339 A.2d at 101 n.2 & 103 n.6.

52. *In re* Haas, Civil Docket No. J-1918 (Pa. C.P. Allegh. Co. 1972).

mitted to a separate facility at Muncy. Failure to allow such a procedure apparently would constitute disparate treatment in violation of the Pennsylvania ERA.[53] The superior court answered by noting that the system of confinement of juveniles was being reviewed by the Pennsylvania Attorney General and since male juveniles more often commit violent crimes, Camp Hill was not an inappropriate detention facility for males.[54]

The marginal discussion of the ERA in *Haas* was only a small facet of the court's attempt to grapple with what appeared to be the general inadequacy of the state's juvenile detention facilities. But, even though *Haas* did not face or resolve an issue of sex discrimination, the case did intimate that criteria for delinquency may be different for male and female juveniles. The superior court noted that males are detained for violent crimes more often than females. While males may have committed a disproportionately higher percentage of violent crimes, it should be understood that the standard of conduct applied to girls might be stricter than that applied to boys. For example, girls might be detained for sexual misconduct which would not subject boys to detention.[55] The application of the juvenile delinquency statutes thus presents potential Pennsylvania ERA problems.

3. *Criminal Justice System Personnel*

The Pennsylvania Parole Law prohibits assignment of a parole officer to a parolee of the opposite sex.[56] Since male offenders and parolees far outnumber female offenders and parolees, the number of women permitted to be hired as parole officers is severely circumscribed. The Pennsylvania Attorney General has issued an opinion[57] terming the limitation unenforceable and superseded by both the Pennsylvania ERA and the Pennsylvania Human Relations Act.[58]

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53. 234 Pa. Super. at 428-29 n.2, 339 A.2d at 101 n.2.

54. *Id.*

55. *See* BINGAMAN, *supra* note 39, at 61-66.

56. PA. STAT. ANN. tit. 61, § 331.28 (1964) states:

> The board [of parole] shall appoint and employ a sufficient number of women as parole officers and supervisors to act as such for the women over whom it shall have power and jurisdiction, and no person of one sex shall be paroled in charge of a parole officer of the opposite sex.

57. 1972 OP. PA. ATT'Y GEN. 150.

58. PA. STAT. ANN. tit. 43, §§ 951-63 (1964), *as amended* (Supp. 1976). *See especially id.* § 955.

Although employment of prison guards would appear to be subject to the same analysis, no case has arisen presenting the point.

C. *Laws Relating to Sexual Assault*

ERA proponents and commentators have identified numerous provisions of state criminal laws concerning sexual assault which would be invalidated by the amendment.[59] Chief among these provisions are the definition of rape as requiring "penetration of the vagina by the penis,"[60] differing punishments for rape and forcible sodomy,[61] and provisions regarding statutory rape of females and seduction of males.[62] The Pennsylvania rape statutes arguably define the act in such a manner as to preclude conviction of a woman for rape,[63] although a court may choose to interpret the statute so as to preserve its constitutionality. On the other hand, because rape and forcible sodomy are both classified as first degree felonies in Pennsylvania,[64] punishment is identical for the two crimes.[65] A violation of the statutory rape provisions is a felony in the second degree,[66] while sodomy with minor males is punishable as a first degree felony.[67] This last instance may be invalid under the Pennsylvania ERA for imposing different penalties for what is essentially

59. *See* BINGAMAN, *supra* note 39, at 85-98; Brown, *supra* note 35, at 955-60.

60. BINGAMAN, *supra* note 39, at 85.

61. *Id.* at 86-87.

62. *Id.* at 87-88.

63. PA. CONSOL. STAT. ANN. tit. 18, § 3121 (1973) provides: "A person commits a felony of the first degree when he engages in sexual intercourse with another person not his spouse: (1) by forcible compulsion . . . ." PA. CONSOL. STAT. ANN. tit. 18, § 3101 (1973) provides in part: " 'Sexual intercourse.' In addition to its ordinary meaning, includes intercourse per os or per anus, with some penetration however slight . . . ." The statutory language seems to imply that penetration of the victim must occur. *But see* Statutory Construction Act of 1972, PA. CONSOL. STAT. ANN. tit. 1, § 1902 (Supp. 1976): "words used in the masculine gender shall include the feminine and neuter."

64. *See* note 63 *supra*. *See also* PA. CONSOL. STAT. ANN. tit. 18, § 3123 (1973): "A person commits a felony of the first degree when he engages in deviate sexual intercourse with another person."

65. *Id.* § 1103: "A person who has been convicted of a felony may be sentenced to imprisonment as follows: (1) In the case of a felony of the first degree, for a term which shall be fixed by the court at not more than 20 years."

66. *Id.* § 3122, *as amended*, Act of May 18, 1976, No. 53, § 1, [1976] Laws of Pa. 89: "A person who is 18 years of age or older commits statutory rape, a felony of the second degree, when he engages in sexual intercourse with another person not his spouse who is less than 14 years of age."

67. PA. CONSOL. STAT. ANN. tit. 18, § 3123 (1973): "A person commits a felony of the first degree when he engages in deviate sexual intercourse with another person: . . . (5) who is less than 16 years of age."

the same offense simply on the basis of the sex of the victim. The legislature, as yet, has not undertaken to revise the sexual assault laws in light of the amendment.[68]

D. *Other Criminal Rules*

The supreme court in *Commonwealth v. Staub*[69] invalidated the state's fornication and bastardy statutes[70] which had imposed different penalties on men and women for producing an illegitimate child. These statutes subjected both parents to a one hundred dollar fine, but only the father was responsible for birth expenses, funeral costs, and security for the child's maintenance. In *Staub* because the appellant objected only on the basis of the fourteenth amendment, the court professed not to consider the case in light of the Pennsylvania ERA, and held the statute unconstitutional because not reasonably related to a state interest.[71] However, since *Staub* was argued jointly with two ERA appeals[72] ERA analysis unavoidably affected the decision. The *Staub* court relied on ERA decisions in *Commonwealth v. Butler*[73] and *Conway v. Dana*.[74] A version of the reciprocal rights test found in support cases[75] appeared, although the court rejected

68. Some statutory changes, however, have been made which may be termed desirable reforms rather than elimination of impermissible sex-based classifications. *See* BINGAMAN, *supra* note 39, at 89-98. In 1973, the legislature repealed a statute which required juries in sexual offense cases to be instructed to evaluate the complainant's testimony with special care in view of the emotional involvement of the witness and the difficulty of determining the truth in such cases. Act of Nov. 21, 1973, No. 115, § 2, [1973] Laws of Pa. 339, *repealing* PA. CONSOL. STAT. ANN. tit. 18, § 3106 (1973). Recent legislation revised the crimes code *inter alia* to limit use of evidence of prior sexual conduct by the victim, to ensure that the testimony of a victim of sexual assault is given the same credibility as other witnesses' testimony and to make clear that resistance by the victim is not required. Act of May 18, 1976, No. 53, § 1, [1976] Laws of Pa. 89, *amending* PA. CONSOL. STAT. ANN. tit. §§ 3106-07 (1973). An earlier version of the bill would have revised the code to the extent of defining all sexual assault in terms which would satisfy ERA objections to the present statute. Pa. House Bill 580, Printer's No. 649 (Mar. 3, 1975). The bill provided: "(a) A person is guilty of criminal sexual assault in the first degree if he or she *engages in sexual penetration* with another person . . . ." *Id.* § 3141 (emphasis added).

69. 461 Pa. 486, 337 A.2d 258 (1975).

70. PA. STAT. ANN. tit. 18, § 4506 (1963), *repealed*, PA. CONSOL. STAT. ANN. tit. 18, § 4323 (1973) (a similar statute which appears to apply to both parents equally).

71. 461 Pa. 490-91, 337 A.2d at 260-61.

72. Wiegand v. Wiegand, 226 Pa. Super. 278, 310 A.2d 426 (1973), *rev'd on other grounds*, 461 Pa. 482, 337 A.2d 256 (1975); Henderson v. Henderson, 224 Pa. Super. 182, 303 A.2d 843 (1973), *rev'd*, 458 Pa. 97, 327 A.2d 60 (1974); *see* section IV, DOMESTIC RELATIONS, *infra*.

73. 458 Pa. 289, 328 A.2d 851 (1974). *See* text accompanying notes 28-35 *supra*.

74. 456 Pa. 536, 318 A.2d 324 (1974). *See* text accompanying notes 129-32 *infra*.

75. *See* text accompanying notes 113-24 *infra*.

the argument that another statute's[76] requirement that a mother support her illegitimate child obviated any inequality in the fornication and bastardy statute.

In *Commonwealth v. Santiago*[77] the supreme court repudiated the common law doctrine of coverture, or coercion of the wife by the husband.[78] Here, the defendant claimed that this doctrine applied to raise a rebuttable presumption that she had not participated volitionally in the drug offenses with which she and her husband were charged.[79] The court found this doctrine outmoded and discredited, and pointed to the requirements of the Pennsylvania equal rights amendment.[80] It generally criticized coverture as a legal fiction having no basis in fact and rejected the defendant's assertion that she had not acted independently of her spouse.

IV. Domestic Relations

A. *Divorce from Bed and Board and Alimony Pendente Lite*

The first spate of cases decided by the courts under the Pennsylvania equal rights amendment involved challenges to statutes which obligated men to pay support or alimony pendente lite to their wives or former wives. The lower courts responded with diverging views on the effect of the amendment on family law. Such differing reactions make clear both that legislative intent was not forcefully conveyed to the judiciary and that not all were readily inclined to accept the clear (though not chaotic) change the ERA has worked in Pennsylvania domestic relations law.

Divorce from bed and board was an anachronism of a legal system which balked at the recognition of absolute divorce from the bonds of matrimony; the divorce *a mensa et thoro* was equivalent to a judicial separation and did not officially dissolve the marriage.[81] By

76. Pa. Stat. Ann. tit. 62, § 1973 (1968) compels specified relatives, including a mother, to contribute to the support of an indigent person.

77. 462 Pa. 216, 340 A.2d 440 (1975).

78. *Id.* at 225, 340 A.2d at 445.

79. *Id.*

> Historically, a married woman committing a crime in her husband's presence, created a rebuttable presumption that the wife was an unwilling participant. The concept of coverture originated with the common law fiction of a unity of husband and wife.

Id. (citation omitted).

80. *Id.*

81. *See* Corso v. Corso, 120 Pitt. L.J. 183, 184-87 (Pa. C.P. Allegh. Co. 1972) (outlines the history of divorce from bed and board).

statute, a wife in Pennsylvania could obtain a divorce from bed and board on grounds such as adultery, life-endangering treatment, and intolerable indignities.[82] The court could then order payment by the husband of permanent alimony (not available in absolute divorces), this order being enforceable by attachment and imprisonment.[83] Apart from alimony awarded for support of an insane spouse,[84] the only other form of alimony available in Pennsylvania was alimony pendente lite, coupled with counsel fees and expenses.[85] The alimony pendente lite statute permitted only the wife to recover these amounts.

In *Corso v. Corso*[86] the trial court reviewed at length the purpose and legislative history of the federal ERA[87] as a prelude to consideration of a constitutional challenge to the statute allowing divorce from bed and board. The opinion emphasized a trend in marriage and divorce law to treat the spouses equally and as individuals.[88] With little more rationale, the court concluded that the statute was unconstitutional under the Pennsylvania ERA.[89] On the same day the same court decided *Kehl v. Kehl*,[90] finding the statutory provision for alimony pendente lite unconstitutional for the reasons given in *Corso*.[91]

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82. PA. STAT. ANN. tit. 23, § 11 (1955) provided:

Upon complaint, and due proof thereof, it shall be lawful for a wife to obtain a divorce from bed and board, whenever it shall be judged . . . that her husband has:

(a) Maliciously abandoned his family; or

(b) Maliciously turned her out of doors; or

(c) By cruel and barbarous treatment endangered her life; or

(d) Offered such indignities to her person as to render her condition intolerable and life burdensome; or

(e) Committed adultery.

83. PA. STAT. ANN. tit. 23, § 47 (1955). *See also* 78 DICK. L. REV. 402, 406 (1974).

84. PA. STAT. ANN. tit. 23, § 45 (1955).

85. *Id.* § 46.

86. 120 Pitt. L.J. 183 (Pa. C.P. Allegh. Co. 1972).

87. *Id.* at 189-96.

88. *Id.* at 187.

89. *Id.* at 200. *See also id.* at 188 where the court stated:

It thus appears that [the ERA] abolished the matter of the substantive rights, remedies and liabilities of women for support, and prohibits them from sharing in the property of the husband. . . .

Apparently, the only future legal remedy for the care of an indigent wife are [*sic*] the "Poor Laws" of Pennsylvania . . . .

As to the issue of sharing the husband's property see DiFlorido v. DiFlorido, 459 Pa. 641, 331 A.2d 174 (1975) discussed *infra* at notes 140-41.

90. 120 Pitt. L.J. 296, 57 Pa. D. & C.2d 164 (C.P. Allegh. Co. 1972).

91. *Id.* at 296, 57 Pa. D. & C.2d at 165.

Other lower courts were reluctant to accept the equal rights amendment's mandate. *Frank v. Frank*[92] upheld divorce from bed and board and alimony pendente lite, the court expressing the belief that the proposed reading of the ERA would destroy the concept of marriage. Such drastic action should properly come from a clear expression by the legislature.[93] The court then reasoned that divorce from bed and board was available only to women not because of their sex but because of their duty to live with their husbands. The marriage contract constituted a waiver by a wife of freedom to live alone and a waiver by the husband of a right not to support anyone.[94] As such, the marriage contract was also a waiver of the rights guaranteed by the ERA. *DeRosa v. DeRosa*[95] also rebutted a challenge to the constitutionality of alimony pendente lite. There the court read the amendment as permitting reasonable classifications—classifications linked to the "very nature" of the persons classified.[96] Thus the statute in question was unobjectionable because it did not provide alimony pendente lite to all women but only to the specific class of women who were without means to defend or maintain a divorce action.[97] The court reasoned that, since the amendment was intended to put women on an equal footing with men, and the alimony statute was intended to put parties to a divorce action on an equal footing, the two were not inconsistent.[98] The obvious flaw in the court's logic was that the statute extended the benefit to women who were without funds but not to men. Sex, not financial capability, was the ultimate criterion. Since the statute assumed that all men were financially able to maintain a divorce action it was exactly the type of legislation an equal rights amendment should invalidate.[99] *Frank* and *DeRosa* reflect judicial inability or unwillingness to discard traditional analysis of sex dis-

92. 14 Lebanon 215, 62 Pa. D. & C.2d 102 (C.P. 1973).

93. *Id.* at 220-22, 62 Pa. D. & C.2d at 106-08. The court also claimed that if the support laws were really offensive to the ERA, the superior court would have raised the issue sua sponte in two cases it had decided recently. *Id.* at 220-22, 62 Pa. D. & C.2d at 106-09. *But see* Wiegand v. Wiegand, 461 Pa. 482, 337 A.2d 256 (1975), *rev'g* 226 Pa. Super. 278, 310 A.2d 426 (1973) (on the basis that the superior court by sua sponte deciding the constitutional issue exceeded its proper appellate function).

94. 14 Lebanon at 220, 62 Pa. D. & C.2d at 107.

95. 60 Del. Co. R. 259, 60 Pa. D. & C.2d 71 (C.P. 1972).

96. *Id.* at 261, 60 Pa. D. & C.2d at 74.

97. *Id.* at 262, 60 Pa. D. & C.2d at 75-76.

98. *Id.* at 262-63, 60 Pa. D. & C.2d at 76-77.

99. *See* Brown, *supra* note 35, at 896-97.

crimination claims and traditional notions of men and women as persons and partners to marriage.[100]

The appellate courts' consideration of the same statutes ended in adoption of the results in *Corso* and *Kehl*. In *Henderson v. Henderson*,[101] an equally divided superior court affirmed a trial court's order that a husband deposit security for attorney's fees and expenses, pursuant to the alimony pendente lite statute. The three dissenters declared that males were denied alimony pendente lite and fees solely because of their sex; therefore the statute should have fallen to the ERA's mandate that sex be discarded as a criterion for determining legal rights.[102] Soon after *Henderson*, *Wiegand v. Wiegand*[103] presented the issues of divorce from bed and board and alimony pendente lite to the superior court. The three *Henderson* dissenters and the judge who did not participate in that decision joined[104] to reverse the lower court decision and to declare unconstitutional the bed and board divorce and alimony pendente lite statutes. The majority proposed a "reciprocal rights" test[105] which had been articulated first in the *Henderson* dissent.[106] Although the statutes in question explicitly extended a right only to wives, the acts would pass constitutional muster if similar rights were otherwise given to husbands. Since no other state statute gave a husband an action for divorce from bed and board and implicitly permanent alimony or for alimony pendente lite, extension of these remedies to wives was violative of the Pennsylvania equal rights amendment.[107]

Before this constitutional issue reached the supreme court, the legislature amended the alimony pendente lite statute to conform to the ERA. The words "wife," "husband," and "ex-wife" were

100. *Cf.* Comment, *The Support Law and the Equal Rights Amendment in Pennsylvania*, 77 DICK. L. REV. 254, 255-57 (1973) [hereinafter cited as *Support Laws*].

101. 224 Pa. Super. 182, 303 A.2d 843 (1973), *rev'd and remanded*, 458 Pa. 97, 327 A.2d 60 (1974). *Accord*, Murphy v. Murphy, 224 Pa. Super. 460, 303 A.2d 838 (1973); Cooper v. Cooper, 224 Pa. Super. 344, 307 A.2d 310 (1973).

102. 224 Pa. Super at 185, 303 A.2d at 845-46 (Spaulding, J., dissenting).

103. 226 Pa. Super. 278, 310 A.2d 426 (1973), *rev'd on other grounds*, 461 Pa. 482, 337 A.2d 256 (1975).

104. 78 DICK. L. REV. 402, 407 (1974).

105. 226 Pa. Super. at 282, 310 A.2d at 428. *See also* 78 DICK. L. REV. 402, 407-08 (1974).

106. Henderson v. Henderson, 224 Pa. Super. 182, 189, 303 A.2d 843, 847 (1973) (Spaulding, J., dissenting).

107. Wiegand v. Wiegand, 226 Pa. Super. 278, 282, 310 A.2d 426, 428 (1973).

deleted and replaced with "spouse" and "ex-spouse."[108] Consequently, the supreme court remanded the *Henderson* appeal for consideration in light of the new statute.[109] Nevertheless, the court took the opportunity to express its view on the purpose of the Pennsylvania ERA and the validity of the challenged statutory scheme. Since the amendment was intended to eliminate sex as a basis for classification, where the law provides a support remedy for the wife, it must provide one for the husband.[110] The court's opinion thus reaffirmed the correctness and desirability of the legislature's action in amending the statute.

The decision of the superior court in *Wiegand*, that the bed and board divorce statute violated the ERA, also reached the supreme court.[111] That court reversed the decision of the superior court on the basis that it had exceeded its authority by sua sponte considering the constitutional issue.[112] As a result there has not been a definitive judicial statement concerning the continued validity of the statute, although it is likely that the court would invalidate it if the question were raised in another appeal. The legislature has not taken action to repeal or amend the statute, which now appears to be moribund.

B. *Interspousal Support*

Inevitably from the maze of statutes allowing spouses to recover support from each other[113] came a challenge under the Pennsylvania ERA. *Commonwealth ex rel. Lukens v. Lukens*,[114] the leading decision, found the superior court upholding the statute allowing a wife to recover support in a quasi-criminal action for desertion.[115] The

108. Act of June 27, 1974, No. 139, § 1, [1974] Laws of Pa. 403, *amending* PA. STAT. ANN. tit. 23, § 46 (1955) (codified at PA. STAT. ANN. tit. 23, § 46 (Supp. 1976)).

109. Henderson v. Henderson, 458 Pa. 97, 327 A.2d 60 (1974).

110. The law will not impose different benefits or different burdens upon the members of a society based on the fact that they may be man or woman. Thus, as it is appropriate for the law where necessary to force the man to provide for the needs of a dependent wife, it must also provide a remedy for the man where circumstances justify an entry of support against the wife.

Id. at 101, 327 A.2d at 62.

111. Wiegand v. Wiegand, 461 Pa. 482, 337 A.2d 256 (1975).

112. *See* Wiegand v. Wiegand, 226 Pa. Super. 278, 280, 310 A.2d 426, 427 (1973): "Neither of [the questions raised by the husband/appellant] is discussed here as there is an additional [constitutional] issue which is controlling."

113. *See generally Support Laws, supra* note 100, at 255-63.

114. 224 Pa. Super. 227, 303 A.2d 522 (1973).

115. PA. CONSOL. STAT. ANN. tit. 18, § 4322 (1973), *formerly* PA. STAT. ANN. tit. 18, § 4733 (1963).

court, in relying on its *Henderson* dissent, reasoned that because a different statute created a substantial reciprocal right of support for husbands, no discriminatory sexual classification existed.[116] This reciprocity rationale was followed by county courts in cases brought under the civil support laws.[117] However, the statute cited in these cases merely renders specified relatives liable for the support of an indigent person.[118] Whether a husband does possess a right to support substantially equivalent to the wife's is arguable.[119] It may be that because the criminal and civil support actions available to wives are not predicated on indigency, wives may recover support in situations where dependent husbands would not. The reciprocal rights test in any event does not strictly comply with the Pennsylvania ERA in that the test condones laws which classify on the basis of sex.

The reciprocity test is significant not only because it represents an attempt by the courts to reconcile the ERA with a pre-existing statutory pattern which reflects presumptions regarding the status of husband and wife, but also because it calms doubts about the role the courts would assume in conforming the old law to the new. A legislature can act expeditiously to resolve the problem posed by these statutes (in most of the support statutes, conformity to the ERA would demand only that the words "wife" and "husband" be changed to "spouse"); courts have felt hesitant to go beyond construction to rewrite the statutory language.[120] Additionally, the courts may have feared that striking down the entire statutory scheme for support would lead to undesirable social effects and would endanger the family as an institution.[121] Reciprocity was a solution to this dilemma. The court could choose "equalization" of

116. 224 Pa. Super. at 229, 303 A.2d at 523.

117. Hess v. Hess, 123 Pitt. L.J. 4 (Pa. C.P. Allegh. Co. 1974) (PA. STAT. ANN. tit. 18, § 4733 (1963) does not violate ERA because husband has right to support under PA. STAT. ANN. tit. 62, § 1973 (1968)); Norris v. Norris, 63 Pa. D. & C.2d 239 (C.P. Phila. Co. 1974) (upheld PA. STAT. ANN. tit. 48, § 132 (1965)); Commonwealth *ex rel.* Mitzel v. Mitzel, 74 Lack. Jur. 139 (Pa. C.P. 1973) (action brought under the Civil Procedure Support Law, PA. STAT. ANN. tit. 62, § 2043.31 (1968)).

118. PA. STAT. ANN. tit. 62, § 1973 (1968) provides: "(a) The husband, wife, child, . . . father and mother of every indigent person . . . shall, if of sufficient financial ability, care for and maintain, or financially assist, such indigent person at such rate as the court . . . shall order or direct."

119. *See, e.g.*, 78 DICK. L. REV. 402, 411-12 (1974).

120. *See, e.g.*, Corso v. Corso, 120 Pitt. L.J. 183 (Pa. C.P. Allegh. Co. 1972).

121. 78 DICK. L. REV. 402, 412 (1974).

the status of husbands and wives over invalidation of the statute.[122] Equalization was achieved not by extending specific rights and remedies to husbands but by construing the state scheme of support laws as non-discriminatory on the whole. The reciprocal rights approach can be reconciled with strong judicial language which decries "different benefits [and] different burdens"[123] if this theory of judicial temperance is accepted.[124]

In an interesting corollary development, perhaps under the influence of the ERA, courts have begun to look more realistically at spouses' claims for support. In *White v. White*,[125] the superior court rejected any initial limitation on appraising a wife's earning capacity when considering the reasonableness of a support order.[126] The court detailed factors which should be taken into account, including employability of women who have been off the job market for years. This approach to an interspousal support issue, treating fairly both the spouse paying and the spouse receiving support, is consistent with the most equanimous interpretation of the Pennsylvania ERA.

Finally, the law has in the past presumed that a husband was primarily responsible for a wife's necessary expenses, while not imposing such primary liability on a wife for the husband's comparable expenses. In *Albert Einstein Medical Center v. Gold*,[127] an action by the hospital against husband and wife for the husband's medical expenses, the court held that under the Pennsylvania ERA a wife could no longer assert lack of legal responsibility as a defense based on the former distinction between the sexes.[128]

C. *Child Support*

Prior to the equal rights amendment, the Pennsylvania courts had held that the primary duty to support minor children rested with the father. The state supreme court abolished this presumption in *Conway v. Dana*,[129] calling it a vestige of the past and incompatible

122. *See* Brown, *supra* note 35, at 913.

123. Henderson v. Henderson, 458 Pa. 97, 101, 327 A.2d 60, 62 (1974).

124. *Cf.* Frank v. Frank, 14 Lebanon 215, 216, 62 Pa. D. & C.2d 102, 103 (C.P. 1973).

125. 226 Pa. Super. 499, 313 A.2d 776 (1973).

126. *Id.* at 504, 313 A.2d at 780: "In the interest of fairness and with consistency in mind, we see no reason why, in this day and age, a court must limit its inquiry to the wife's earnings."

127. 25 Fid. Rep. 337 (Pa. C.P. Phila. Co. 1974).

128. *Id.* at 340.

129. 456 Pa. 536, 318 A.2d 324 (1974).

with present recognition of equality of the sexes.[130] In *Conway* a father had petitioned for reduction of an order of support for his two minor children. His take-home pay had decreased to $625 per month while his former wife was netting $700 per month. The father charged that because of the presumption of his primary duty to support, adequate consideration was not given to the mother's ability to contribute.[131] The court in agreeing with the petitioner reasoned that a child's best interests were not furthered by presuming that the father was the best provider; both parents must be required to discharge their support obligation in accordance with their capacities.[132]

As a result of *Conway* and the Pennsylvania ERA, courts are more conscious of a need to look at the relative resource positions of both mother and father in determining the adequacy of child support orders.[133] In *Commonwealth ex rel. Buonocore v. Buonocore*[134] the court upheld a support order of thirty dollars per week against a wife where the minor children were residing with the husband. Although the actual impact of the new child support rule may be undramatic overall (since more often than not husbands earn more and will contribute more), in individual cases the abolition of the former presumption complies with the ERA's mandate of according equal treatment to parents regardless of sex.

An interesting subsidiary question which has arisen with the child support cases is whether the ERA requires mathematical equality of contributions, measured by either dollar amounts or percentages. Theoretically, it should not, since a law may define support obligations functionally, taking into consideration current resources, earning power and non-monetary contributions of both spouses.[135] In one

130. *Id.* at 539, 318 A.2d at 326.

131. *Id.* at 539, 318 A.2d at 325-26.

132. *Id.* at 540, 318 A.2d at 326.

133. *See* Kaper v. Kaper, 227 Pa. Super. 377, 323 A.2d 222 (1974) (remanding to trial court to consider support order in light of ERA, and mother's income and needs relevant); Commonwealth *ex rel.* Evans v. Evans, 61 Del. Co. R. 649 (Pa. C.P. 1974) (rejecting claim that ERA demands 50-50 split of child support between father and mother); Sperry v. Sperry, 29 Som. L.J. 228, 231 (Pa. C.P. 1974) (stating that the ERA's rule of equality is imposed upon all duties and benefits of marriage and parenthood, in accordance with the resources and talents of the parties). *Cf.* Commonwealth *ex rel.* Travitzky v. Travitzky, 230 Pa. Super. 435, 326 A.2d 883 (1974) (ERA does not require that earnings of father's second wife be considered part of his income in determining amount of support for children by first wife—only proper relevant inquiry is what portion of second family's budget is contributed by second wife).

134. 235 Pa. Super. 66, 340 A.2d 579 (1975).

135. Brown, *supra* note 35, at 946.

Pennsylvania case, the father claimed that the equal rights amendment limited his obligation to one half of the amount needed to support his child.[136] The court rejected this argument, saying that it ignored individual capacities, actual relative incomes, and non-monetary contributions of the custodial parent.[137] On the whole, the support cases have begun to reflect this concern for functional rather than mathematical equality.[138]

D. *Marital Property and Decedents' Estates*

Property law probably presents the largest number of statutes and rules which are constitutionally suspect under the ERA.[139] Yet the decisions have raised only a few of the issues, and even fewer areas have been subjected to legislative scrutiny. The two leading decisions have invalidated common law presumptions which were based on a traditional belief of the husband's dominant position in a marriage.

In *DiFlorido v. DiFlorido*[140] a wife sought to recover certain personal property and household goods which she and her husband had accumulated prior to and during marriage. The trial judge ordered the husband to pay one half of the appraised value of the household goods to the wife. On appeal the husband contended that as sole provider during marriage he was presumed the owner of all goods in the spouses' joint possession. The supreme court did not agree. It found the presumption of funding by the husband to be an antiquated offshoot of former notions of the wife's property rights. Even an alternative rule based on actual proof of funding was unacceptable under the ERA, since it would not account for equally important non-monetary contributions. Accordingly the court ruled that in future cases regarding ownership of household goods, the presumption would be that property acquired in anticipation of, or during marriage, and possessed and used by both spouses, is held as entire-

136. Commonwealth *ex rel.* Evans v. Evans, 61 Del. Co. R. 649 (Pa. C.P. 1974).

137. *Id.* at 651-52.

138. *See* White v. White, 226 Pa. Super. 499, 313 A.2d 776 (1973), discussed in text accompanying notes 125-26 *supra*; Sperry v. Sperry, 29 Som. L.J. 228, 232 (Pa. C.P. 1974) ("equality of obligation of spouses to support themselves and their children does not necessarily mean equality of monetary contributions"). *Cf.* Commonwealth *ex rel.* Lukens v. Lukens, 224 Pa. Super. 227, 303 A.2d 522 (1973).

139. *See* STATUTORY REVIEW PROJECT, *supra* note 3, at 5.

140. 459 Pa. 641, 331 A.2d 174 (1975).

ties property.[141] *DiFlorido* is thus consistent with the spouse and child support cases which adopted a realistic view of the nature and extent of contributions made by the two members of the marital community.

Another common law presumption recently abrogated by the supreme court concerned interspousal gifts. Formerly, when a wife obtained an interest in her husband's property (for example, where the husband placed property into a tenancy by the entirety) a factual presumption arose that a gift had been made to the wife.[142] On the contrary, if a husband similarly received an interest in his wife's property, there was a presumption of a constructive trust in the wife's favor.[143] The rules were based on the assumption that the husband was dominant in the marriage, and the wife was to be protected against undue influence by him. *Butler v. Butler*[144] found this one-sided presumption inconsistent with the ERA. The court ruled that after *Butler*, gifts made by either spouse to the other would be presumed entireties property; a constructive trust would be imposed only where one spouse was shown in fact to have influenced the other unfairly.[145]

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141. *Id.* at 648-51, 331 A.2d at 178-80.

142. *See, e.g.*, Shapiro v. Shapiro, 424 Pa. 120, 224 A.2d 164 (1966).

143. *See, e.g.*, DeBernard v. DeBernard, 384 Pa. 194, 120 A.2d 176 (1956). PA. STAT. ANN. tit. 68, § 501 (1965) provides that upon divorce property held by husband and wife as tenants by the entireties shall be held by them as tenants in common.

144. 347 A.2d 477 (Pa. 1975).

The remedy of a constructive trust is available when the confidential relationship of marriage is abused by a spouse who through fraud or undue influence causes the other to make a gift to the entireties. *Id.* at 479. The two presumptions described in the text above were used to determine when such an abuse of the confidential relationship occurred. The presumptions probably rest on a notion that men are more knowledgeable in and likely to dominate property and business transactions.

145. *Id.* at 480-81. *See* Hakes v. Hakes, 67 Pa. D. & C.2d 25 (C.P. Sull. Co. 1974). In *Hakes*, a husband sued his wife for one-half the property she had bought with an inheritance from her first husband. The plaintiff claimed the wife was dominant in their relationship, had refused to take the property in both names as she had promised, and therefore had overreached him and taken undue advantage of their confidential relationship. The court found no confidential relationship on the facts, and appeared to discard the presumptions of gift and constructive trust. 67 Pa. D. & C.2d at 31. After noting the effect of the ERA on "familiar and comfortable shibboleths," the court in *Hakes* said:

> [T]he most favorable reading of [the old rules] . . . would place the present parties in an equal posture. At best, it appears to this court, that a wife may not now be considered as a perpetual donee. This application of the cited rules is preferable to reducing both parties to the status of dominated marital partners so as to allow plaintiff, in this case, to "rest" his case after proving the marriage alone.

Id.

One of the few ERA decisions to date concerning decedents' estates found an inheritance tax statute,[146] which has since been repealed, unconstitutional.[147] The act, which was in effect at the testator's death in 1953, classified decedents' daughters-in-law, but not sons-in-law, as lineal descendants. Since lineals paid a two percent inheritance tax while collaterals, including sons-in-law, paid a fifteen percent tax, the court found the classification violative of the ERA. The statute in question had been repealed in 1961,[148] and the present statute does not suffer from the same infirmity.

Two county courts have faced challenges to the Pennsylvania rule which stated that a surviving husband was primarily liable for his wife's funeral expenses and expenses incident to her last illness, even though she had a separate estate, and, where the husband elected to take against the will, even though the will directed payment of the expenses. In *Rollman Estate*[149] and *Rush Estate*[150] the courts held the rule unconstitutional under the ERA as incompatible with the amendment's anti-discriminatory intent[151] and invalidly presuming that a surviving husband was better able to bear the financial burdens in question.[152]

Two of the most obvious existing examples of classification by sex in the estate laws are the statutes governing forfeiture of the spouse's share in the intestate estate,[153] and forfeiture of the right to elect against the will of a spouse dying testate.[154] A husband forfeits his share or his right to elect if he neglects or refuses to provide for his wife, or willfully and maliciously deserts her for a year before her death. A wife forfeits these rights only if she deserts her husband for a year before his death. Given the recent developments in the support law, the statutes are clearly unconstitutional, and should be conformed to the ERA.

Revision of several statutes allowing a married woman in certain circumstances to act as a *feme sole* is also in order. One such statute[155] allows a wife, following nonsupport or separation, to be de-

146. Act of June 20, 1919, No. 258, art. I, § 2, [1919] Laws of Pa. 521.
147. Englund Estate, 25 Fid. Rep. 341 (Pa. C.P. Phila. Co. 1975).
148. Act of June 15, 1961, No. 207, art. XII, § 1201, [1961] Laws of Pa. 373.
149. 71 Pa. D. & C.2d 6, 25 Fid. Rep. 633 (C.P. Lanc. Co. 1975).
150. 26 Fid. Rep. 212 (Pa. C.P. Northam. Co. 1976).
151. Rollman Estate, 71 Pa. D. & C.2d 6, 11, 25 Fid. Rep. 633, 637 (C.P. Lanc. Co. 1975).
152. Rush Estate, 26 Fid. Rep. 212, 215 (Pa. C.P. Northam. Co. 1976).
153. PA. CONSOL. STAT. ANN. tit. 20, § 2106 (1975).
154. *Id.* § 2509.
155. PA. STAT. ANN. tit. 48, § 44 (1965). The constitutionality of this statute was raised

clared a *feme sole* trader and to dispose of property during life, by will, or by intestacy as if her husband were dead. Another statute[156] permits a deserted or abandoned wife to sue her husband or to testify against him as a *feme sole*. A bill making the latter statutes applicable to both spouses was introduced in 1975 but has not yet passed the legislature.[157]

E. *Consortium*

While Pennsylvania has long recognized a husband's right to sue for loss of consortium, as recently as 1960, in *Neuberg v. Bobowicz*,[158] the supreme court definitively refused to extend this cause of action to wives. The court reasoned that although the cause of action for loss of consortium was vague, outmoded, and anomalous, to grant the cause of action to women would not lift their status to that of men, but would only reduce men to the status of chattels also.[159]

Following the passage of the ERA, in *Hopkins v. Blanco*,[160] the court overruled *Neuberg* and extended the cause of action to wives. The *Hopkins* court approached the issue by questioning whether the cause of action for a husband was still viable, concluding that it was.[161] Consequently, the court felt obligated to extend the cause of action to women, in light of the ERA.[162] The amendment therefore had the corrollary effect of reaffirming the desirability of the action for consortium. The *Neuberg* court, although expressing dislike for the action, did not strike it down. *Hopkins*, while revitalizing the consortium action, redefined it to eliminate any assumption that the legally recognized functions and obligations of spouses were not identical.[163]

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in Commonwealth *ex rel.* Arslanian v. Arslanian, 61 Del. Co. R. 67, 67 Pa. D. & C.2d 618 (C.P. 1974), although the court did not reach the question.

156. PA. STAT. ANN. tit. 48, § 114 (1965).

157. Pa. House Bill 256, Printer's No. 279 (Feb. 5, 1975).

158. 401 Pa. 146, 162 A.2d 662 (1960).

159. *Id.* at 154-55, 162 A.2d at 666, *quoting* Mlynek v. Yarnall, 28 Leh. L.J. 341, 19 Pa. D. & C.2d 333 (C.P. 1959).

160. 457 Pa. 90, 320 A.2d 139 (1974).

161. *Id.* at 94, 320 A.2d at 141.

162. *Id.* at 93, 320 A.2d at 140.

163. *See* Brown, *supra* note 35, at 944:

> [T]he Equal Rights Amendment would prohibit enforcement of the sex-based definitions of conjugal function, on which the discriminatory consortium laws are based. Courts would not be able to assume for any purpose that women had a legal obligation

F. *Married Women's Names*

The Pennsylvania Attorney General has issued several opinions ruling that under the equal rights amendment a married woman may retain her birth name. In a 1973 opinion dealing specifically with the name to be used under the Vehicle Code for an operator's license or vehicle registration,[164] the Attorney General concluded that the Vehicle Code required only that a person use his or her "actual" name.[165] This could mean a birth name or marriage name, as long as it was consistently used. In any event, the Attorney General noted that neither the common law of Pennsylvania nor any statutory authority required a woman to choose one name over another.[166] The equal rights amendment also required this conclusion, for denying a woman the freedom to keep her birth name while routinely allowing this right to men would be an impermissible impediment based on sex.[167]

V. Education

Sex discrimination in education was the subject of one ERA case. In *Commonwealth v. Pennsylvania Interscholastic Athletic Association*[168] the commonwealth court invalidated a by-law of the Pennsylvania Interscholastic Athletic Association (Association) that prohibited girls from practicing or competing in interscholastic high school sports.[169] The Pennsylvania Justice Department brought suit against the Association, challenging the validity of the by-law under the fourteenth amendment to the Federal Constitution and under the state ERA. The Association argued that girls were gener-

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to do housework, or provide affection and companionship, or be available for sexual relations, unless men owed their wives exactly the same duties.

164. 1973 Op. Pa. Att'y Gen. 172.

165. Pa. Stat. Ann. tit. 75, § 407 (1971).

166. 1973 Op. Pa. Att'y Gen. 172.

167. Another opinion extended the Attorney General's finding to an election statute, Pa. Stat. Ann. tit. 25, §§ 623-20(c), 951-18(c) (1963), requiring use of the "surname." 1973 Op. Pa. Att'y Gen. 209. Later these new rulings were made applicable for purposes of licensure to all boards and commissions under the jurisdiction of the Commissioner of Professional and Occupational Affairs. 1974 Op. Pa. Att'y Gen. 28.

168. 18 Pa. Commw. 45, 334 A.2d 839 (1975).

169. The Pennsylvania Interscholastic Athletic Association was a voluntary unincorporated association of most public senior high schools. *Id.* at 48, 334 A.2d at 840. The by-law in question provided: "Girls shall not compete or practice against boys in any athletic contest." *Id. citing* PIAA By-Laws art. XIX, § 3B.

ally weaker and more injury-prone than boys. These physical differences necessitated the exlusion of girls from competition with boys, and since a separate system of all girl teams existed, female students suffered no denial of equal opportunity. The court however, while declining to consider the federal question, found the by-law facially unconstitutional under the ERA,[170] in that it denied girls equality under the law[171] solely because of sex. The court felt that although girls could constitutionally be excluded from participation in athletic competition because of individual weakness or lack of skill, any generalized classifications based on sex violated the ERA. Finally, as if to underscore the breadth of its decision, the court held that its order would apply also to football and wrestling, two sports the Commonwealth had specifically exempted from its complaint.[172]

Before argument and decision of the *PIAA* case, the State Board of Education (Board) had acted to prevent sex discrimination in scholastic athletics under its control. The Board amended its regulations governing the physical education curriculum[173] to require, first, that intramural athletic programs provide boys and girls with equal access to facilities, equipment, and funding appropriate to the sport.[174] Secondly, in the area of interscholastic activities, school districts must not exclude girls from existing boys' teams, and must provide separate programs to boys and girls, with equal access to equipment, facilities, coaching and funding.[175] These regulations attempt to cure past, and prevent future inequality in athletic programming by requiring an overall program which permits girls to compete at every skill level, whether their competitors be male or female.[176] The regulations are consistent with *PIAA*[177] in that they

170. 18 Pa. Commw. at 49, 334 A.2d at 841. *See generally* 14 DUQ. L. REV. 101 (1975).

171. The Association's functions had been found previously to be state action. Thus, the court said the mandate of the ERA was applicable. 18 Pa. Commw. at 51, 334 A.2d at 842.

172. *Id.* at 48 n.2, 53, 334 A.2d at 841 n.2, 843.

173. 22 PA. CODE § 5.25 (1974).

174. *Id.* § 5.25(d).

175. *Id.* §§ 5.25(e)(2)-(4).

176. *See* 4 PA. BULL. 2171 (1974):

> The Board was especially concerned with devising a formula that would assure equal opportunity in athletics for members of both sexes in light of overwhelming evidence of inadequate programming for girls in many areas and in light of the mandate of the people of Pennsylvania as expressed in Article I, § 28, of the Pennsylvania Constitution. Thus, in § 5.15(e)(2) [*sic*; § 5.25(e)(2)], the Board has required that each school district provide a comprehensive *program* of athletics to both boys and girls, taking into account what may be the special needs and/or interests of the students. Such a program may consist of separate *teams* for boys and girls in certain sports where this

require that girls be permitted to compete with boys.[178] But they are also designed to accommodate the fear that making participation opportunities available only on the basis of superior skill, strength or size could effectively exclude girls from all school sports.[179] Such a system, though facially neutral, might be unconstitutional in impact.[180] While recognizing that the problems in this area of education are numerous and complex,[181] the Pennsylvania administrative solution appears to be responsive to ERA requirements.

Sex discrimination in educational institutions within the Commonwealth is prohibited, independently of the Pennsylvania ERA, by several statutory and administrative provisions. Title IX of the Federal Civil Rights Act[182] prohibits sex discrimination in educational programs receiving federal funds. On the primary and secondary levels, students in Pennsylvania public schools are guaranteed a free and full education without regard to sex.[183] Additionally, the Fair Educational Opportunities Act[184] prohibits sex discrimination

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is desirable in order to maintain or develop effective male or female participation in athletic programs; or, as provided in § 5.25(e)(3), it may also include coeducational *teams* so long as the basic concept of equal access as described in § 5.25(e)(2) is maintained. Finally, where separate teams for boys and girls are included in the program, girls may not be excluded solely on the grounds of sex (though they may be on the grounds of ability (§ 5.25(e)(4)). This latter provision was included as a recognition of the present reality—i.e., that many boys' teams have, by virtue of the preferences previously accorded to them, achieved an advantage in the level of competition and prestige in their schools. In accordance with the well-recognized principle of affirmative action, girls may thus attempt to develop their skills at the highest level of competition afforded at their school.

177. The regulations appeared to be prompted by the Commonwealth's initiation of suit against the Association.

The proposed regulations do not seek to control the activities of any private or voluntary organization. However, the regulations recognize interscholastic athletics as a part of the total educational program and assert State Board authority over interscholastic athletics. To the extent that there is any conflict between State Board regulations and the rules of any other organization, the regulations of the State Board shall control.

4 PA. BULL. 2171 (1974).

178. 22 PA. CODE § 5.25(e)(4) (1974): "No rules may be imposed that exclude girls from trying out for, practicing with, and competing on boys' interscholastic teams."

179. Bingaman, *supra* note 39, at 124-25.

180. *See, e.g.*, 14 DUQ. L. REV. 101, 110 n.64 (1975).

Separate-but-equal teams for boys and girls are of doubtful constitutionality under the ERA. Bingaman, *supra* note 39, at 123. *But see* Ritacco v. Norwin School Dist., 361 F. Supp. 930 (W.D. Pa. 1973).

181. Bingaman, *supra* note 39, at 122-30.

182. 20 U.S.C. §§ 1681-86 (Supp. V, 1975).

183. 22 PA. CODE § 12.4 (1974). In addition, neither pregnancy nor marital status can affect this right. *Id.* §§ 12.1(a), (c).

184. PA. STAT. ANN. tit. 24, §§ 5001-10 (1962), *as amended*, (Supp. 1976). *See also* 22 PA.

in post-secondary institutions. Such institutions, therefore, may not discriminate on account of sex in admission or other practices. This statute does provide an important exemption for institutions which are not state owned, state related or state aided; such schools may enroll members of either sex in any proportion, or exclude one sex entirely.[185] Because the Pennsylvania equal rights amendment does not apply to private institutional practices, the statutory exception may pose no constitutional infirmity.[186] Overall, state statutes and regulations independently bring the Commonwealth's educational system closely in line with ERA requirements. However, some Pennsylvania public secondary schools retain sex-based admissions practices. These practices contravene the ERA by perpetuating a separate-but-equal system of high school education, and are susceptible to attacks in the courts.[187]

VI. Employment

One commentator[188] has concluded that a federal ERA will have a marginal impact on employment because of the pervasive influence of Title VII.[189] Similarly, the practical effect of the Pennsylvania ERA on state employment law has been, and probably will remain, minimal. Title VII and state legislation, particularly the Human Relations Act (HRA),[190] have for years prohibited sex discrimination in employment practices. The HRA is applicable to those employing four or more persons within the Commonwealth,[191]

Code §§ 32.1-.6 (1975).

185. Pa. Stat. Ann. tit. 24, §§ 5004(a)1-3, (aa)1-3 (Supp. 1976).

186. *Id.* § 5009. The section also specifically names those schools considered to be state owned, related or aided. *But see* note 201 *infra*.

187. *Cf.* Vorchheimer v. School District, 532 F.2d 880 (3d Cir. 1976), holding that gender-based admission requirements at two single-sex Philadelphia high schools did not offend the equal protection clause. The district court had granted relief to the female plaintiff who sought admission to an all male school. 400 F. Supp. 326 (E.D. Pa. 1975). That court however declined to accept pendent jurisdiction over a claim under the Pennsylvania ERA, stating that standards regarding its applicability had not been clearly established in the Pennsylvania courts. 400 F. Supp. at 332-33.

188. Hillman, *Sex and Employment Under the Equal Rights Amendment*, 67 Nw. U.L. Rev. 789, 841 (1973) [hereinafter cited as Hillman].

189. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-15 (1970), *as amended*, 42 U.S.C. §§ 2000e to 2000e-17 (Supp. V, 1975).

190. Pa. Stat. Ann. tit. 43, §§ 951-63 (1964), *as amended* (Supp. 1976). *See also* Equal Pay Law, Pa. Stat. Ann. tit. 43, §§ 336.1-.10 (1964), *as amended* (Supp. 1976); 34 Pa. Code §§ 9.61-.65 (1968).

191. Pa. Stat. Ann. tit. 43, § 954(b) (Supp. 1976).

covering substantially all employers. This act was amended in 1969 to specifically include sex as an unlawful basis of discrimination.[192] It is important to note also that the Human Relations Act reaches private discrimination as well as discrimination by the Commonwealth as an employer.[193] Since the Pennsylvania ERA can reach only action "under the laws" of the Commonwealth state action is required to bring constitutional proscriptions into play. The effect of the Pennsylvania ERA should be to invalidate any statutes inconsistent with its mandate; the HRA overlaps the ERA in this respect also because it provides for the repeal of any law inconsistent with its provisions.[194] The field of employment was therefore, before the adoption of the equal rights amendment, already regulated by anti-discrimination legislation of a scope broader than that of the ERA.

Even in instances where both the Human Relations Act and the ERA would invalidate a sex-based classification, those interpreting the laws may prefer to work within known statutory structures, avoiding reliance on constitutional provisions until necessary. For example, the state unemployment compensation statutes formerly unlawfully discriminated against women by deeming ineligible for unemployment benefits those who voluntarily left work because of pregnancy.[195] In 1974, the Pennsylvania Attorney General ruled that

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192. PA. STAT. ANN. tit. 43, § 955 (Supp. 1976):

> It shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification . . . .
>
> (a) For any employer because of the . . . sex . . . of any individual to refuse to hire or employ, or to bar or to discharge from employment such individual, or to otherwise discriminate against such individual . . . if the individual is the best able and most competent to perform the services required.

193. PA. STAT. ANN. tit. 43, § 954(b) (Supp. 1976).

194. PA. STAT. ANN. tit. 43, § 962(a) (1964) provides: "The provisions of this act shall be construed liberally for the accomplishment of the purposes thereof, and any law inconsistent with any provisions hereof shall not apply."

Pennsylvania's "protective" female labor statute, PA. STAT. ANN. tit. 43, §§ 101-33 (1964), *as amended* (Supp. 1976), which would have been a prime target of the ERA, was held in 1969 to have been impliedly repealed by the Human Relations Act's sex amendment. Kober v. Westinghouse Elec. Corp., 325 F. Supp. 467, 471-72 (W.D. Pa. 1971) (citing unpublished opinion of Pennsylvania Attorney General, Nov. 14, 1969). *Kober* also held that the women's "protective" labor law was in conflict with Title VII insofar as it regulated hours of employment, and that under the supremacy clause, U.S. CONST. art. VI, cl. 2, the federal legislation prevailed. 325 F. Supp. at 474.

195. The statute provided, *inter alia*:

> An employe shall be ineligible for compensation for any week—
>
> . . . .
>
> (b)(1) In which his unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature . . . . Provided, That a voluntary leaving work

the provisions in question were inconsistent with the Human Relations Act and therefore invalid,[196] finding it unnecessary to reach the ERA question.[197]

Given the existing statutory scheme, the most interesting inquiry in employment discrimination should be the extent to which the ERA will modify the proscriptions of the Human Relations Act. The bona fide occupational qualification provision (BFOQ) of the Act[198] is an exception to the Act's ban on sex discrimination intended to be of limited scope and to apply only when business necessity demands.[199] Nevertheless, on its face the BFOQ, as a state law which permits sex discrimination, would appear to violate the ERA's ban on discriminatory state action.[200] The question then is whether the BFOQ and the business necessity defense should be available after passage of the ERA.[201] Conceptually it is possible to reconcile the two. The BFOQ test if narrowly construed should compel the same result as an equal rights amendment. Arguably, the BFOQ contemplates classification based on "sex-as-sex," or sexual characteristics as such and not stereotyped or statistically proven notions of characteristics.[202] Thus an employer could lawfully restrict hiring to only one sex (1) where a physical characteristic unique to a sex is required to perform the job, as with wet nurses or sperm donors, (2)

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because of pregnancy . . . shall be deemed not a cause of a necessitous and compelling nature . . . .

PA. STAT. ANN. tit. 43, § 802(b)(1) (1964). The statute has since been amended to remove the offensive provisions. PA. STAT. ANN. tit. 43, § 802(b)(1) (Supp. 1976).

196. 1974 OP. PA. ATT'Y GEN. 29. *See* PA. STAT. ANN. tit. 43, § 962(a) (1964), note 194 *supra*.

197. 1974 OP. PA. ATT'Y GEN. 29, 31 n.1.

It is interesting to note that the Attorney General apparently equated constitutionality under the ERA with that under the fourteenth amendment.

198. PA. STAT. ANN. tit. 43, § 955 (Supp. 1976).

199. 16 PA. CODE §§ 41.71(a)-(b) (1974).

200. *See* Leechburg Area School Dist. v. Commonwealth, 19 Pa. Commw. 614, 618-19 n.2, 339 A.2d 850, 853 n.2 (1975): "An issue not raised here but of potential import is the effect of the ERA upon the continued constitutional viability of the bona fide occupational qualification exemption provided by . . . the Act."

201. *Cf.* Hillman, *supra* note 188, at 828 (discussing the very similar Title VII BFOQ defense and possible impact of an ERA). Note that the ERA's impact may extend into the area of private discrimination on the basis that state laws regulating private discrimination, such as Title VII and the Human Relations Act, must themselves comply with the ERA.

202. 1 A. LARSON, EMPLOYMENT DISCRIMINATION: SEX § 14.00 (1975) [hereinafter cited as LARSON].

It is probably correct to say that under the ERA a BFOQ defense would not be available for sex-based classifications involving non-unique physical characteristics. Hillman, *supra* note 188, at 828.

where authenticity demands it, as in casting an actress to play a female role, or (3) where privacy or "decency" must be protected, as in the hiring of rest room attendants.[203] Such a definition of the scope of the BFOQ correlates well with the requirements of the ERA,[204] which allows classification by unique physical characteristics, and makes exception to preserve the right of privacy.[205]

The soundness of this proposed analysis is supported by actual judicial and administrative practice in applying the BFOQ. In *Cerra v. East Stroudsburg Area School District*[206] the supreme court found "sex discrimination pure and simple" in a school district regulation compelling termination of teachers' employment at the end of the fifth month of pregnancy. The district's regulation, the court found, singled out pregnant teachers as a class and discriminated against them solely on the basis of sex;[207] male teachers suffering from temporary disabilities were not so harshly treated.[208] In so holding, the court refused the school district's claim of a BFOQ justification.[209] Subsequent to this decision the Human Relations Commission promulgated regulations making an exclusionary employment policy or practice based on pregnancy a prima facie violation of the HRA, shifting the burden to the employer to demonstrate that the exclusion is warranted under the limited BFOQ exception.[210] The regulations formalize the requirement that pregnancy and childbirth disabilities be treated as any other temporary disability.[211]

The result in *Cerra* probably would have been reached independently under the Pennsylvania ERA. While under the amendment it can be argued that pregnancy as a physical characteristic unique to females is a valid basis for classification,[212] the soundness of such reasoning is suspect. A more acceptable analysis is that courts must apply standards of relevance and necessity to expose laws which

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203. LARSON, *supra* note 202, §§ 14.10-.30.

204. *Cf.* Brown, *supra* note 35, at 894 (citing laws concerning wet nurses as permissible under the ERA); LARSON, *supra* note 202, at § 14.10 (citing the same type of law as meeting the BFOQ test).

205. Brown, *supra* note 35, at 926.

206. 450 Pa. 207, 299 A.2d 277 (1973).

207. *Id.* at 213, 299 A.2d at 280.

208. *Id.*

209. *Id.*

210. 16 PA. CODE §§ 41.101-.102 (1975).

211. *Id.* §§ 41.103-.104.

212. See Hillman, *supra* note 188, at 797. *Cf.* Cerra v. East Stroudsburg Area School Dist., 450 Pa. 207, 213, 299 A.2d 277, 280 (1973) ("[pregnant women] are discharged from their employment on the basis of a physical condition peculiar to their sex").

evade the intent of the amendment. Such standards include the availability of less drastic alternatives, the relationship between the characteristic and the problem which purportedly requires the classification, and the proportion of the problems attributable to the characteristic.[213] Under this analysis, pregnancy must be treated as only one type of temporary disability which has little distinct relevance to job-connected concerns, such as the extent to which the disability actually reflects upon job performance, competence, and efficiency.[214] If pregnancy is singled out from other temporary disabilities the classification discriminatorily isolates the sex-linked part of the real problem—that the employee may be unable to work.[215]

Thus it can be argued that not only are the Pennsylvania equal rights amendment and the BFOQ exception to the Human Relations Act consistent,[216] but they also apply essentially the same test to discriminatory practices. The HRA, however, will continue to have a more substantial impact on employment because it regulates private employment practices where no state action is involved.

Finally, although there is no applicable case law, the amendment has directly affected state labor laws containing sex-based exclusions from occupations. The state Attorney General has issued opinions on several such "protective" laws, terming them unconstitutional under the ERA. Declared invalid were the section of the state Athletic Code which barred females from being licensed as boxers and wrestlers,[217] a child labor law prohibiting female minors from

213. Brown, *supra* note 35, at 894-96.

214. *Cf.* Cerra v. East Stroudsburg Area School Dist., 450 Pa. 207, 214, 299 A.2d 277, 280 (1973) (noting that problems of continuity of instruction arise from absence due to any temporary disability).

215. Brown, *supra* note 35, at 932.

216. In support of this see Leechburg Area School Dist. v. Commonwealth, 19 Pa. Commw. 614, 619 n.2, 339 A.2d 850, 853 n.2 (1975):

> [T]he key language of the ERA is the concluding phrase, "because of the sex of the individual." This would indicate that differentiations in the employment relationship which related to competence or "bona fide occupational qualifications" rather than the sex of an individual would not be inconsistent with the ERA.

Note that since a BFOQ in this context admittedly is a sex-based classification, the commonwealth court's statement above is inaccurate insofar as it can be inferred that a BFOQ is not on its face a classification by sex, as competence is not. Perhaps implicit in the court's conclusion is consideration of the standards of relevance and necessity which reveal whether the classifications by sex will effectuate the purpose of the classifications by physical characteristic.

217. PA. STAT. ANN. tit. 4, § 30.310 (1963), *deemed unconstitutional in* 1973 OP. PA. ATT'Y GEN. 103.

distributing newspapers in public places,[218] and provisions which precluded female cosmetologists from fashioning men's hair.[219] Numerous other sex-based exclusions appear in the labor laws of the state.[220] No litigation has triggered court decisions invalidating them, and the legislature has not yet taken action to repeal those statutes which have been declared unconstitutional or to effect a systematic revision of other laws which exclude individuals from occupations on the basis of sex.

VII. The Standard of Review Under the ERA

Any assessment of the Pennsylvania ERA's impact on state law must involve an analysis of the standard of review, or standard of equality,[221] which the courts follow in interpreting the amendment. Such a study is useful to show whether passage of the amendment marks a new approach to sex discrimination claims, or merely clarifies and consolidates the traditional equal protection standard. In Pennsylvania the outcome of such an analysis offers no clear-cut results. The cases find the courts relying to a great extent on fourteenth amendment reasoning; but it is submitted that the ERA and its symbolic significance have led courts to invalidate sex-based classifications with a fresh vigor.

A state constitutional provision barring sex discrimination cannot be read in a vacuum. Because sex discrimination claims have been decided under the equal protection guarantee of the fourteenth amendment, its judicial implementation inevitably serves as a reference point against which to measure the extent of the new amendment's prohibitions. Unquestionably, support for an equal rights amendment is largely an indication of dissatisfaction with treatment of sex discrimination claims under the fourteenth amendment,[222] most notably with the failure of the Supreme Court to label sex a suspect classification.[223]

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218. Pa. Stat. Ann. tit. 43, § 48 (1964), *deemed unconstitutional in* 1971 Op. Pa. Att'y Gen. 130.

219. Pa. Stat. Ann. tit. 63, § 507 (1968), *deemed unconstitutional in* 1971 Op. Pa. Att'y Gen. 126.

220. *See, e.g.*, Statutory Review Project, *supra* note 3, at 4.

221. The term "standard of equality" appears in Hillman, *supra* note 188, *passim*.

222. *Cf.* note 11 *supra*. *See also* Dorsen & Ross, *The Necessity of a Constitutional Amendment*, 6 Harv. Civ. Rights—Civ. Lib. L. Rev. 216 (1971).

223. In 1971, the United States Supreme Court for the first time invalidated a sex-based classification using a minimum scrutiny or reasonableness test. Reed v. Reed, 404 U.S. 71

In contrast to the divergence of opinion regarding the contours of an equal protection standard, an equal rights amendment worded as the Pennsylvania and proposed federal[224] provisions provides a sound basis for the argument that classifications by sex are prohibited absolutely.[225] At the very least, an equal rights amendment should mandate a strict scrutiny standard.[226] If the Pennyslvania ERA is not to be emasculated it must be interpreted to mean at least this much, since the standard of review will determine the ERA's ultimate significance. Unless courts make a clear choice among the theoretically possible standards of review—minimal scrutiny, strict scrutiny, or absolute prohibition—the ERA cannot be used to its full potential as a weapon against sex discrimination.

A. *The Absolute Standard in Theory*

The history of the proposed federal ERA indicates that supporters and congressional authorities believed the amendment's command to be pristinely simple—any classification based on sex is impermissible.[227] But this conceptualization has been criticized as inaccurate,[228] for the "absolute" standard does admit of at least two exceptions, and under certain circumstances requires resort to more conventional constitutional analysis. The two exceptions are the right

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(1971). *See* Bingaman, *supra* note 39, at 6-7. The Court has on at least one occasion come close to adopting strict scrutiny in sex discrimination cases. *See* Frontiero v. Richardson, 411 U.S. 677 (1973) (four Justices would have applied the strict standard of review).

224. *Compare* the text of the Pennsylvania equal rights amendment quoted in text accompanying note 2 *supra*, with the proposed federal amendment: "Equality of rights under the law shall not be denied by the United States or by any State on account of sex." H.R.J. Res. 208, § 1, 92d Cong., 2d Sess., 86 Stat. 1523 (1972).

225. *See* Brown, *supra* note 35, at 889, 892-93:

> The basic principle of the Equal Rights Amendment is that sex is not a permissible factor in determining the legal rights of women, or of men. This means that the treatment of any person by the law may not be based upon the circumstances that such person is of one sex or the other. . . . In short, sex is a prohibited classification. . . .
>
> . . . .
>
> . . . [I]t follows that the constitutional mandate must be absolute. The issue under the Equal Rights Amendment cannot be different but equal, reasonable or unreasonable classification, suspect classification, fundamental interest, or the demands of administrative expediency. Equality of rights means that sex is not a factor. This at least is the premise of the Equal Rights Amendment.

226. Bingaman, *supra* note 39, at 18. This is also a permissible inference from Justice Powell's statement in Frontiero v. Richardson, 411 U.S. 677, 692 (1973) (concurring opinion), that passage of the Federal ERA would resolve doubt as to whether sexual classifications are suspect.

227. *See* note 225 *supra*.

228. *See* Hillman, *supra* note 188, at 833.

to privacy qualification and the unique physical characteristic qualification. Under the former, segregation by sex in such facilities as rest rooms, institutional sleeping quarters and dressing rooms is permissible to protect the individual's constitutional right to privacy.[229] The second exception permits laws which classify on the basis of physical characteristics unique to a sex—for example, wet nurses and sperm donors could be regulated as classes. If a physical characteristic which is present in all or some members of one sex but not in any member of the opposite sex is the classifying basis, the ERA would not be contravened.[230] Thus, severely limited classifications by sex *would* be permissible under the ERA and an absolute standard of review.[231]

Classifications which are facially sex-neutral but discriminatory in impact also pose a problem under an absolutist equal rights amendment. An example of such a classification would be regulation which permitted high schools to have only one athletic team per sport. This rule would preclude most girls from participating in sports programs, because of their relatively small size or lack of training.[232] The spirit of the ERA would demand looking beyond the face of the regulation, ostensibly proper under the absolute standard of review, to determine the existence of a discriminatory effect.

This outline of the absolute standard suggests that while it is not really absolute, it is undeniably more rigorous than any heretofore proposed constitutional standard of sexual equality.

B. *The ERA Standard in Pennsylvania*

The courts of Pennyslvania in interpreting the ERA have not expressly adopted an absolute standard of review, although the in-

229. Brown, *supra* note 35, at 900. The authors admit that the parameters of the right of privacy as set by the United States Supreme Court are not clearly delineated. *Id.* Additionally, they caution that the sex-segregated private facilities would have to be equal even though separate. *Id.* at 901. *But cf. id.* at 902, noting that the separate-but-equal doctrine has "no place in the Equal Rights Amendment."

230. *Id.* at 893.

231. The unique physical characteristic exception poses a difficult problem when pregnancy is the characteristic used. Pregnancy occurs only in women, and therefore laws imposing different treatment on this basis would seem beyond the ERA's sanction. However, an acceptable resolution is possible with analysis of the necessity of the classification and its relevance to the end to be achieved. *Id.* at 894. As mentioned before, the ERA would require in most cases that pregnancy be treated as any other temporary disability. *See* text accompanying notes 210-11 *supra*.

232. Bingaman, *supra* note 39, at 33. *See* text accompanying notes 177-81 *supra* for the Pennsylvania solution.

terpretation process has shown glimmers of sympathy for the test. The decisions have generally amalgamated a new constitutional provision with fourteenth amendment analysis. Individual plaintiffs may not quarrel with this approach since the decisions have almost unanimously invalidated challenged statutes and rules, whatever the constitutional test applied. But from an analytical perspective, the major shortcoming of the Pennsylvania ERA cases is their failure to clarify the standard of review. Most importantly, the ERA's potential will be seriously undercut if the courts fail to accept a distinct, "absolute" standard.

The leading statements of the supreme court concerning an ERA standard of review appear in *Conway v. Dana,*[233] *Henderson v. Henderson,*[234] and *Hopkins v. Blanco.*[235] In these cases the court concluded that under the ERA sex was *no longer a permissible factor* in the determination of legal rights and legal responsibilities.[236] This strong language is capable of supporting an absolute test. But actual rationales of decisions of the supreme and lower courts indicate that just as framers and proponents of the *federal* ERA found it necessary to qualify the amendment's command, so, in the course of adjudication courts have found it necessary, consciously or not, to refrain from a fully "absolute" interpretation of the Pennsylvania ERA. The significant fact is that because the courts have not explicitly adopted a pure ERA formulation of sexual equality, they have not defined their standard solely in ERA terminology (and its very restrictive qualifications) but have done so in the context of fourteenth amendment conventions, which may ultimately lead to erosion of the ERA's mandate.

An example of a hybrid standard is found in *Commonwealth v. Butler.*[237] While finding a violation of the ERA, the court's language supports the inference that it did so because the classification in question had no rational basis, and also affected a fundamental right, combining minimum and strict scrutiny tests. *Butler* then implies that the ERA standard is redundant of the fourteenth amendment. Whether or not exaggerated by unnecessarily confusing language, this type of narrow reading of the ERA has appeared

233. 456 Pa. 536, 318 A.2d 324 (1974). *See* text accompanying notes 129-32 *supra.*
234. 458 Pa. 97, 327 A.2d 60 (1974). *See* text accompanying notes 101-07 *supra.*
235. 457 Pa. 90, 320 A.2d 139 (1974). *See* text accompanying notes 160-63 *supra.*
236. *See, e.g.,* Henderson v. Henderson, 458 Pa. 97, 101, 327 A.2d 60, 62 (1974).
237. 458 Pa. 289, 328 A.2d 851 (1974). *See* text accompanying notes 34-35 *supra.*

in other opinions, especially those of trial courts which have sanctioned "reasonable" classifications.[238]

The most outstanding examples of reliance on fourteenth amendment analysis appear in the support and divorce cases.[239] *Conway v. Dana*[240] invalidated a presumption that a father was primarily liable for support of children, but did so because the child's best interests would not be furthered by this assumption.[241] The statement rings of an equal protection conclusion that the state's purpose would not be furthered by the differing treatment. Consequently this rationale would allow sex-based treatment to exist, under the ERA, if the child's interests would be furthered.

The reciprocal rights test postulated by the superior court in *Commonwealth ex rel. Lukens v. Lukens*[242] also applied a non-ERA standard. The court concluded that because a husband had a reciprocal right to support from his wife (even though her right to support under a number of statutes might be mathematically greater than his) those statutes extending a support right only to the wife did not effect arbitrary or discriminatory treatment. In terms of equal protection analysis, the court's language presumably means not that the classifications were reasonable or justifiable for compelling reasons, but that the statutes did not initially extend different treatment to persons in similar circumstances. Men and women were actually treated equally.

The reciprocity test is undoubtedly contrary to the pure theory of the ERA. As suggested above it may have been adopted because of a desire to avoid judicial legislation,[243] and in recognition of the "revolutionary" effect of the ERA. Regardless of motive, even assuming substantial reciprocity, a highly questionable assumption, the *Lukens* test is unacceptable. The concept of "substantial" legal equality should be foreign to the Pennsylvania equal rights amendment. Under the ERA, the mere fact that a statute extends a benefit only to one sex indicates unequal and therefore unlawful treatment. Absent categorization within an ERA exception, the statute is invalid.[244]

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238. *See, e.g.*, DeRosa v. DeRosa, 60 Del. Co. R. 259, 60 Pa. D. & C.2d 71 (C.P. 1972) (ERA permits "reasonable" classifications).

239. *See* discussion at notes 86-91 and 95-100 *supra*.

240. 456 Pa. 536, 318 A.2d 324 (1974). *See* text accompanying notes 129-32 *supra*.

241. *Id.* at 540, 318 A.2d at 326.

242. 224 Pa. Super. 227, 303 A.2d 522 (1973).

243. *See* discussion at notes 113-24 *supra*.

244. Note also that the concept of separate-but-equal is unacceptable under the ERA. *But*

An analysis of a commonwealth court case, *Percival v. City of Philadelphia*,[245] also illustrates use of equal protection concepts in attempting to define the scope of the ERA. But further, it can be argued that it is possible to infer from the case support for a constitutional standard which is distinct from strict scrutiny and rational basis. Though clothed in conventional terms, the *Percival* court's approach displays the unique impact of the ERA and can provide a framework for explanation of a new standard of sexual equality.

A state statutory scheme exempted married women from arrest and imprisonment on a writ of capias ad respondendum.[246] In *Percival*, facing a challenge to this act, the commonwealth court expressly raised the question of what standard of review was intended under the ERA. The court concluded that the proper and intended standard of review was a middle ground between a test of relationship to legislative purpose, and a test which made sex, like race, a wholly impermissible basis for classification.[247] Because the court's language is ambiguous the character of the *Percival* ERA standard is unclear. If race, the outer limit, is a suspect classification, then *Percival* proposed a standard which falls short of the mark proposed by most commentators—that is, that the ERA demands at least a test of strict scrutiny.

On the other hand, the *Percival* court may have used race as an example not of a merely suspect classification, but of an absolutely prohibited one.[248] Using this assumption, the ERA standard is less than an absolute one, but more than an equal protection one.[249] Here it is important to note that the court relied on a previous federal

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see Comment, *An Overview of the Equal Rights Amendment in Texas*, 11 HOUSTON L. REV. 136, 142 (1973). The reciprocal rights test was also used in the bed and board divorce cases, there invalidating the sex-based statute. *See, e.g.*, Wiegand v. Wiegand, 226 Pa. Super. 278, 310 A.2d 426 (1973), *rev'd on other grounds*, 461 Pa. 482, 337 A.2d 256 (1975). *See also* 78 DICK. L. REV. 402, 410-11, (1974).

245. 12 Pa. Commw. 628, 317 A.2d 667 (1974).

246. PA. STAT. ANN. tit. 12, §§ 171, 255-56, 304 (1953); PA. R. CIV. P. 1481.

247. 12 Pa. Commw. at 639, 317 A.2d at 673.

248. *See Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969), noting that after Brown v. Board of Educ., 347 U.S. 483 (1954), decisions and commentators implied that the United States Supreme Court applies a per se rule to racial classifications. 82 HARV. L. REV. at 1089. This "colorblind" principle would be based on the rationale that the state may *never* differentiate between persons on the basis of race. *Id.* at 1088-90.

249. The court explicitly stated that the statute did not meet the equal protection test: "Does the exemption . . . deny equality of right to a non-exempt man with dependent children because of his sex? It seems to us that it does and that the exemption, although it passes the test of equal protection, fails that of Article I, Section 28." 12 Pa. Commw. at 639, 317 A.2d at 673. *But see* 14 DUQ. L. REV. 101, 109 n.55 (1975).

court decision[250] that held the same statute valid under the strict scrutiny test as serving a compelling state interest. It is therefore possible to read the *Percival* test as falling between an absolute standard and a strict scrutiny test. The court may have felt that the ERA was intended to eliminate sex-based classifications, but was unwilling to adopt a no-exception standard. Perhaps the court tacitly shared the apprehensions of ERA commentators that an absolute standard would not leave room for exceptions protecting, for example, the right of privacy.

But a reading of *Percival* which reveals a test somewhere between strict scrutiny and absolutism is in accord with the true ERA test. Arguably, the only conceivable standard which would be more restrictive than strict scrutiny but less restrictive than absolutism would be the absolute standard subject to the limited exceptions discussed above.[251] Such a framework is qualified and pragmatic, and unequivocally eliminates sex as a determining factor, avoiding dilution of the ERA which will occur if the "discretionary weighing of preferences" innate in strict scrutiny or reasonableness analysis is injected into the ERA.[252]

The above analysis of *Percival* is admittedly speculative, but the same court's opinion in *Commonwealth v. Pennsylvania Interscholastic Athletic Association*[253] is in accord with a non-discretionary, unequivocal ERA standard. There the court in seemingly unqualified language[254] rejected a sex-based classification. Interestingly, the court also noted that the provision in question did not fit into the permissible ERA exception for classification by unique physical characteristic.[255] It is arguable therefore that *Percival* and *PIAA* together show the commonwealth court implicitly adopting a standard of review distinct to the ERA which can avoid incursions such as the reciprocal rights test and allow the ERA to achieve its full potential.

250. Non-Resident Taxpayers Ass'n v. Murray, 347 F. Supp. 399 (E.D. Pa. 1972), *aff'd*, 410 U.S. 919 (1973).

251. *See* text accompanying notes 228-30 *supra*.

252. Brown, *supra* note 35, at 892.

253. 18 Pa. Commw. 45, 334 A.2d 839 (1975). *See* text accompanying notes 168-72 *supra*.

254. *But see* 14 DUQ. L. REV. 101, 106 & n.37 (1975).

255. 18 Pa. Commw. at 52, 334 A.2d at 841.

VIII. Conclusion

The prevailing standard under the Pennsylvania ERA is not the more desirable "absolute" or non-discretionary theory. The adoption of an analysis partially redundant of fourteenth amendment considerations is understandable given the difficulty courts have had in discovering legislative intent and the reality that the bulk of important ERA cases have arisen in the domestic relations area. Consequently, the courts have had to overcome initial reluctance to apply the equal rights amendment beyond political, educational and economic boundaries and into the realm of the family.[256] ERA changes in the criminal justice system are not likely to trigger emotional reactions or affect the number of people as will changes in the support laws. And the areas of education and employment were already substantially regulated by prohibitions against sex discrimination prior to enactment of the ERA. Especially in the case of Title VII and the Human Relations Act, existing statutory requirements were highly compatible with ERA standards. No such guidance or experience was available in cases dealing with intra-family rights and duties.

Constitutional adjudication under the Pennsylvania equal rights amendment is a piecemeal attack on sex-based classification. The short answer to the problem of discriminatory state laws is comprehensive legislative revision. The courts, however, should not be reluctant to interpret the ERA expansively, but should accept the requirements of the ERA in full. Once it is understood that an equal rights amendment does not lead to disastrous social consequences, and does not nullify other constitutional rights, acceptance will come more easily. Perhaps if the courts recognize that social theories are already in a process of change they will realize that full implementation of the ERA is fitting and appropriate for this moment in history.

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256. *See* Henderson v. Henderson, 224 Pa. Super. 182, 186, 303 A.2d 843, 846 (1973) (Spaulding, J., dissenting) ("[w]hile . . . the Amendment does not adopt . . . extremist views" it is not limited to political, educational or economic equality, but also extends to domestic relations).